In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-833

GUSTAVE CARL GALAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was deprived of the effective assistance of counsel because the trial court denied a continuance requested because of an alleged eye injury his counsel suffered at the outset of the trial.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on four counts of willfully assisting in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). He was sentenced to concurrent two-year prison terms on each of the four counts (I-R. 89).[1] The court of appeals affirmed by order (Pet. App. A).

The proof showed that petitioner, a lawyer, and his two co-defendants, a certified public accountant and a beaver salesman, joined together to induce high-income taxpayers

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[1] "R." refers to the record in the court of appeals.

to invest in beavers as a tax shelter. The annual depreciation of the beavers provided the purported tax deduction. While depreciation is ordinarily deductible, the evidence showed that petitioner encouraged the fraudulent abuse of this deduction through the device of backdating purchase contracts. The result was that the taxpayers whose returns petitioner prepared claimed a full year's depreciation for beavers for years in which they did not in fact own the beavers, or in which they owned the beavers for only a short period of time.

Petitioner was arraigned on May 7, 1974, and appeared with Wayne Anthony, an associate of his principal counsel, James P. Cantillon. The trial was set for June 11, 1974. On June 7, 1974, appearing again with Anthony, petitioner moved for a continuance, based partly upon the ill health of Cantillon. The court indicated that it would consider a two-week continuance (I-R. 16, 86). On June 11, 1974, the original trial date, petitioner moved for a continuance. The court reluctantly granted a continuance of nearly two months, with the warning that the trial would proceed on August 6, 1974. The court further warned petitioner that if, for some reason, Cantillon would not be available to represent petitioner, then petitioner should retain other counsel or have the court appoint counsel for him (I-R. 86-87).

On August 6, 1974, petitioner again moved for a continuance based upon an alleged eye injury sustained by Cantillon on August 4, 1974. After observing the state of Cantillon's health, the district court directed that a jury be selected on August 6, 1974. The court directed Anthony to remain throughout the trial as Mr. Cantillon's co-counsel. Petitioner, himself an attorney, was granted the privilege of participating in his own defense by examining witnesses. The trial commenced two days later, on August 8, 1974 (I-R. 87; II-R. 7-14).

1. It is well established that the granting or refusing of a continuance rests within the discretion of the trial court. See, *e.g., United States* v. *Makley,* 468 F.2d 916, 917 (C.A. 9); *United States* v. *Young,* 470 F.2d 962, 964 (C.A. 9), certiorari denied, 410 U.S. 967, and cases cited therein; *United States* v. *Casey,* 480 F.2d 151, 152 (C.A. 5), certiorari denied, 414 U.S. 1045. Here, the record refutes petitioner's claim that the district court abused its discretion. The crucial physician's affidavit submitted in support of the motion for continuance (I-R. 68-69) was largely hearsay and was prepared by a doctor who neither prescribed to nor treated Cantillon for the alleged injury to his eye. Moreover, there were compelling reasons for continuing with the trial. As the trial court pointed out, "this is a multi-defendant case, other lawyers are involved, the Government's witnesses have come from other states * * *" (II-R. 13).

The basic flaw in petitioner's position is that it fully accepts his counsel's claim that he was unable to proceed effectively because of the alleged injury to his eye and the effects of the drugs he was allegedly taking. But it is quite clear from the record that the trial court never believed petitioner's counsel Cantillon and that the court observed him with great care in order to insure that he was in no way incapacitated. Thus, in denying the motion for new trial and referring to the condition of counsel's eye at the beginning of the trial, the court stated (VI-R 921):

> Now, I must say that I think I have known you long enough, Mr. Cantillon, to know when you are aching and when you are acting, and I think that you were acting.

The court continued (VI-R. 922):

> ***[Y]ou appeared in court with what appeared to the Court to be a black eye, and once you found that

> you were not going to get a continuance of this case, you summoned immediate renewal of vigor, and you employed your usual fine trial technique. And I watched this case very closely to be sure that there would not occur a time when this defendant was less than adequately represented, and I can honestly say to him and for this record that he had a fine lawyer representing him, one, that is, that did not so far as I was concerned, suffer from anything that rendered him less than almost admirably capable of giving legal representation to his client.

Moreover, at the end of the third day of the trial, at the time petitioner's counsel was suffering from his alleged eye injury, the following exchange took place (IV-R. 486-487):

> THE COURT: At the beginning of the trial I made an order from the bench that Mr. Anthony must remain at all sessions of this trial. I made that order because I desired to have a back-up lawyer, if not better than that for Mr. Galas. It appears during the events that have followed that Mr. Cantillon's health has remarkably improved and he has represented his client in his usual very skillful manner, and I don't think we need Mr. Anthony's presence here any more unless Mr. Galas or Mr. Cantillon desire him to be here. So at least for the purposes of the record, I recant the order requiring Mr. Anthony to attend future sessions of this trial.
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> MR. CANTILLON: Very well, that is what I was going to move for, your Honor.

In light of the foregoing, the court of appeals correctly concluded that an examination of the record demonstrated that petitioner "was afforded fully effective assistance of counsel" (Pet. App. A).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.